First Amendment Rights

Times: MW 11:00 A.M.–12:15 P.M. Room: 108
Office Hours: MW 10:00–11:00 A.M.

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Description
Perhaps the most iconic feature of the U.S. Constitution, the First Amendment retains a popular place in the public imagination. This course focuses primarily on the freedom of speech guaranteed by the First Amendment, with due attention also given to freedom of association and the religion clauses. Because the language of the constitutional text is so vague—extending protection to the “freedom of speech” or the “free exercise” of religion—our understanding of First Amendment law will depend entirely on Supreme Court opinions and scholarly critiques of those opinions. Our study of First Amendment case law and theory will be supplemented with exercises designed to present you with problems you might face in practice. Finally, as the First Amendment tends to be bar examiners’ favorite “Con Law” subject, we will supplement our study with practice bar-type questions as well.

Required Materials
2019 Casebook Supplement [Link]

Recommended Supplementary Reading
The First Amendment chapters in the Chemerinsky treatise (recommended in your Constitutional Law course) are just as useful as the rest of the book. If you are looking for a First-Amendment-focused supplement, the following are suggested:

John C. Knechtle, Mastering First Amendment Law (Carolina Academic Press, 2018)
Robert C. Powers & Mark C. Alexander, A Short & Happy Guide to the First Amendment (West 2016)

Website
We will use the SIU D2L webpage for our class. Please check it often for new postings.
Learning Objectives
At the conclusion of this course, students should be able to:
- identify the unprotected categories of speech and explain why they receive no First Amendment protection.
- state the test for commercial speech and explain why this category receives a unique standard.
- identify a prior restraint on speech, distinguish it from a subsequent punishment, and analyze its constitutionality.
- undertake a compelled speech analysis.
- explain why freedom of association is protected and under what standard.
- explain the principle of content neutrality.
- undertake forum analysis for speech that occurs on government property.
- explain time, place, and manner restrictions as a means of incidental speech regulation.
- apply rational basis review, intermediate scrutiny, and strict scrutiny as required by case law.
- apply the Lemon test, as well as competing tests, for Establishment Clause claims.
- apply the Smith test for Free Exercise claims.
- confidently approach MBE and MEE bar-style questions on the First Amendment.

Evaluation
Midterm (out-of-class) 20%
Final Examination 80%

The midterm will be a timed, bar-style essay (30 minutes) that you will write out in Examplify during a time of your own choosing within a timeframe to be determined during Week 6 of the semester. The final exam will be cumulative and will consist of both multiple-choice and essay questions patterned after those you will encounter on the bar exam. All exams will be closed-book.

S/U Grading
The grades of students who have elected to take this course with S/U grading will be converted by the Registrar according to the following scale: 2.1 or greater = Satisfactory; below 2.1 = Unsatisfactory. Only students who receive a Satisfactory grade will earn academic credit for the course. Otherwise, the course requirements and expectations do not differ for students taking the course for an S/U grade.

Attendance Policy
The Attendance Rules specified in the School of Law Rules III.5(f)–(g) are in full force. Attendance will usually be taken with a sign-in sheet, which each student is required to sign at the beginning of class. It should be noted that a student who is called upon in class, but in the opinion of the instructor, is unprepared, may be marked as absent for the day. A student may “note out” of class discussion for a particular day but must not sign the attendance sheet for that day.
Laptops and Other Electronic Devices
Laptop computers should not be used in class for any purpose other than taking notes. If any student inappropriately uses a laptop (for sending email, chatting, web browsing, etc.) he/she will be marked as absent for the day. The easiest way to avoid suspicion of laptop misuse is not to use one in class in the first instance.

Workload Expectations
The American Bar Association (“ABA”) law-school-accreditation standards contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310, “a ‘credit hour’ is an amount of work that reasonably approximates not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks.” This is a 3-credit hour class, meaning that we will spend two 75-minute blocks of time together each week. The amount of assigned reading and out-of-class preparation should take you about 3 hours for each class session and 6 hours for the week. All told, applying the ABA standard to the number of credits offered for this class, you should plan on spending no less than 9 hours per week (3 in class and 6 preparing for class) on course-related work.
Reading Assignments
(subject to change)

CHAPTER 1: THE PROBLEM OF SUBVERSIVE ADVOCACY

Monday, August 19
A. First Encounters, pp. 3–12
B. The Abrams Case and the Holmes Dissent, pp. 12–16
C. Learned Hand and the Masses Case, pp. 16–22

Wednesday, August 21
F. Brandenburg v. Ohio and Its Implications, pp. 50–60
G. The “True Threat,” pp. 60–63
H. A Last Word from Justice Holmes, pp. 63–65

CHAPTER 2: UNPROTECTED SPEECH: THE CHAPLINKSY EXCLUSIONS

Monday, August 26
A. “Fighting Words”, pp. 67–75
Chapter 3: A. Offensive Language and Images, pp. 155–75

B. “The Libelous”—or Otherwise Tortious

Wednesday, August 28

Monday, September 2 – Labor Day Holiday

Wednesday, September 4

Monday, September 9

CHAPTER 3: NEW CANDIDATES FOR CATEGORICAL EXCLUSION OR LIMITED PROTECTION

Wednesday, September 11
C. Commercial Speech, pp. 197–232

CHAPTER 4: TRANS-SUBSTANTIVE DOCTRINES

Monday, September 16
A. Prior Restraints, pp. 265–94
CHAPTER 5: CONTENT-BASED REGULATION

Wednesday, September 18
A. The Principle, pp. 305–12, supp. p. 1
B. Defining Content Discrimination, pp. 312–24, supp. p. 1

CHAPTER 6: REGULATING THE “TIME, PLACE, AND MANNER” OF PROTECTED SPEECH

Monday, September 23
A. Early Development of the Doctrine, pp. 341–50
B. Applications of the Doctrine, pp. 350–60

Wednesday, September 25
B. Applications of Doctrine, pp. 360–88

CHAPTER 7: EXPRESSIVE CONDUCT AND SECONDARY EFFECTS

Monday, September 30
A. Expressive Conduct, pp. 389–407

Wednesday, October 2
B. “Secondary Effects” as a Basis for Regulation, pp. 407–29
C. Expression and Conduct: Untangling the Doctrines, pp. 429–44

CHAPTER 8: SPEECH ON GOVERNMENT PROPERTY AND THE PUBLIC FORUM DOCTRINE

Monday, October 7
A. Foundations of the Doctrine, pp. 445–53

Wednesday, October 9
D. Speech on Private Property, pp. 505–08

CHAPTER 9: COMPELLED EXPRESSION

Monday, October 14
A. Compelled Speech, pp. 509–26, supp. pp. 11–12

Wednesday, October 16
CHAPTER 10: FREEDOM OF ASSOCIATION, pp. 537–65 (entire chapter)
CHAPTER 12: BEYOND REGULATION: THE GOVERNMENT AS EMPLOYER AND EDUCATOR

Monday, October 21

Wednesday, October 23
B. The First Amendment in the Public Schools, pp. 641–63

CHAPTER 13: BEYOND REGULATION: WHOSE MESSAGE IS IT?

Monday, October 28
B. When is the Government the Speaker?, handout (Summum) + pp. 686–704

CHAPTER 15: TESTING THE BOUNDARIES OF DOCTRINE

Wednesday, October 30
A. “Hate Speech,” pp. 739–60

Monday, November 4
C. The Internet as the New Public Square?, pp. 772–82

CHAPTER 17: THE ESTABLISHMENT CLAUSE

Wednesday, November 6

Monday, November 11 – Veterans Day Holiday

Wednesday, November 13
B. School Prayer, pp. 857–77
C. School Curriculum, pp. 877–85

Monday, November 18

CHAPTER 18: THE FREE EXERCISE CLAUSE

Wednesday, November 20
B. Modern Cases, pp. 946–77
CHAPTER 19: INTERRELATIONSHIPS AMONG THE CLAUSES

Make-up Class by Recorded Lecture
B. Tensions between the Religion Clauses, pp. 1008–30

Make-up Class by Recorded Lecture

Thanksgiving Vacation, November 22–December 1

FINAL EXAMINATION: Wednesday, Dec. 4, 8:15 A.M.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.